KTS NEWS SDN BHD A

v.

SEE HUA REALTY BHD & ANOR

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: Q-02-941-2007]
19 JANUARY 2011 C

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Whether court has inherent power to review and set aside orders made by first coram of the court - Functus officio - Doctrine of - Whether order regularly obtained could be altered, varied or set aside by another coram - Federal Constitution, art. 121(1B) - Courts of Judicature Act 1964, s. 67(1) - Rules of the High Court 1980, O. 92 r. 4* D

CIVIL PROCEDURE: *Judgment - Setting aside - Jurisdiction of court to review and set aside order made by first corum of the court - Functus officio - Doctrine of - Whether order regularly obtained could be altered, varied or set aside by another coram of the court - Whether application an abuse of the court process - Federal Constitution, art. 121(1B) - Courts of Judicature Act 1964, s. 67(1) - Rules of the High Court 1980, O. 92 r. 4* E F

The first respondent's notice of motion (encl. 36a) prayed for an order to review and set aside the winding up order made by another coram of this court ('the first coram') against the second respondent. The appellant and the liquidators jointly raised a preliminary objection on the ground that encl. 36a was G incompetent and ought to be dismissed *in limine* as it was an attempt by the first respondent to reopen and review an appeal that had been disposed of by the first coram. The first respondent, however, contended that this coram had the jurisdiction to review the decision of the first coram and relied on *Ramanathan Chelliah v. PP* and *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd*. The issue that arose herein was whether H this coram had the inherent power or jurisdiction to review and set aside the orders made by first coram of this court. I

Held (dismissing encl. 36a *in limine*)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) This court being a creature of statute only enjoys jurisdiction by virtue of statutory provisions (*Regina v. Collins*). The substantive provisions enacted in art. 121(1B) of the Federal Constitution and s. 67(1) of the Courts of Judicature Act 1964, either expressly or by necessary implication, do not confer any 'review jurisdiction' on this court (*Harbhajan Singh v. Karam Singh*; *Drew v. Willis*; *Anantharaju Shetty v. Appu Hegade*; *Trilok Singh v. State Transport Authority*; *Fernandes v. Ranganayakulu*). (para 11)

(2) The word 'review' in the context of 'judicial review' has been expressly enacted in O. 53 of the Rules of the High Court 1980, in which case, the jurisdiction by way of judicial review is clear and unambiguous. The absence of the word 'review' in art. 121(1B) of the Federal Constitution, s. 67(1) of the Courts of Judicature Act 1964 and O. 92 r. 4 of the Rules of the High Court 1980 means that no review jurisdiction had ever been conferred upon this court. (para 27)

(3) It is in the interest of the state and the public that there is finality in litigation. This is consistent with the doctrine of '*functus officio*' which means 'having discharged his duty'. In other words, a court having performed the function under the law has spent the authority and has no further authority to exercise in the same matter. (para 28)

(4) Where an order which had been regularly obtained and had been drawn up and perfected, in the absence of an appeal against it, the court had no power under any application in the same action to alter, vary or set it aside, except under the slip rule, so far as necessary to correct errors in expressing the intention of the court. Enclosure 36a was nothing more than a classic attempt by the first respondent to have a second bite at the proverbial cherry and so was an abuse of the process of the court (*Perdana Merchant Bankers Bhd v. Marial-Rionebel (M) Sdn Bhd*). On the foregoing grounds, the preliminary objection was sustained. (para 32)

Bahasa Malaysia *Translation Of Headnotes*

Notis usul responden pertama (lampiran 36a) memohon untuk perintah kajian semula dan mengenepikan perintah penggulungan yang dibuat oleh coram yang lain mahkamah ini ('coram pertama') terhadap responden kedua. Perayu bersama-sama likuidator-likuidator telah membangkitkan bantahan awalan atas alasan bahawa lampiran 36 adalah tidak kompeten dan sepatutnya ditolak *in limine* kerana ia merupakan satu percubaan oleh responden pertama untuk membuka semula dan mengkaji semula rayuan yang telah diketepikan oleh coram pertama. Responden pertama, bagaimanapun, berhujah bahawa coram ini mempunyai bidangkuasa bagi semakan semula keputusan coram pertama dan bergantung kepada kes *Ramanathan Chelliah v. PP* dan *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumimoto Insurance (Malaysia) Bhd*. Isu yang timbul di sini adalah sama ada coram ini mempunyai kuasa sedia ada atau bidangkuasa untuk menyemak balik dan mengenepikan perintah-perintah yang dibuat oleh coram pertama mahkamah ini.

Diputuskan (menolak lampiran 36 *in limine)*
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah sebagai ciptaan statut hanya menikmati bidangkuasa mengambilkira peruntukan-peruntukan statutori (*Regina v. Collins*). Peruntukan-peruntukan tetap digubal di dalam per. 121(1B) Perlembagaan Persekutuan dan s. 67(1) Akta Mahkamah Kehakiman 1964, sama ada dengan nyata atau secara tersirat, tidak memberikan apa-apa 'bidangkuasa mengkaji semula' ke atas mahkamah ini (*Harbhajan Singh v. Karam Singh*; *Drew v. Willis; Anantharaju Shetty v. Appu Hegade*; *Trilok Singh v. State Transport Authority*; *Fernandes v. Ranganayakulu*).

(2) Perkataan 'kajian semula' dalam konteks 'semakan semula kehakiman' telah dengan nyata digubal di dalam A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980, oleh itu, bidangkuasa melalui semakan semula kehakiman adalah nyata dan jelas. Ketiadaan perkataan 'kajian semula' di dalam per. 121(1B) Perlembagaan Persekutuan, s. 67(1) Akta Mahkamah Kehakiman 1964 dan A. 92 k. 4 Kaedah-kaedah Mahkamah Tinggi 1980 bermakna tiada bidangkuasa mengkaji semula telah diberi ke mahkamah ini.

(3) Ia adalah dalam kepentingan negeri dan orang ramai untuk mendapatkan kemuktamadan dalam litigasi. Ini adalah konsisten dengan doktrin '*functus officio*' yang bermakna 'telah melepaskan tugasnya'. Dalam erti kata lain, mahkamah telah melaksanakan kuasanya di bawah undang-undang dan telah menggunakan kuasanya dan tidak mempunyai apa-apa kuasa lagi untuk dilaksanakan di dalam perkara yang sama.

(4) Di mana satu perintah yang telah diperolehi secara teratur dan telah dibentukkan dan disempurnakan, dalam ketiadaan rayuan terhadapnya, mahkamah tidak mempunyai kuasa di bawah apa-apa permohonan di dalam tindakan yang sama untuk mengubah atau mengenepikan, kecuali di bawah kaedah khilaf, setakat yang perlu untuk memperbetulkan kesalahan-kesalahan di dalam menyatakan tujuan-tujuan mahkamah. Lampiran 36a tidak lebih dari satu percubaan klasik oleh responden pertama untuk diberi peluang kedua membuktikan kesnya dan itu adalah satu penyalahgunaan proses mahkamah (*Perdana Merchant Bankers Bhd v. Marial-Rionebel (M) Sdn Bhd*). Atas alasan-alasan tersebut, bantahan awal dipertahankan.

Case(s) referred to:

Affin Bank Bhd v. WT Low & Ng Realty Sdn Bhd [2003] 1 CLJ 674 HC ***(refd)***

Anantharaju Shetty v. Appu Hegade, AIR 1919 Mad 244 ***(refd)***

Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***

Chang Shu Hua v. Goon Fook Hong [2008] 3 CLJ 429 CA ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2004] 4 CLJ 157 FC ***(refd)***

Drew v. Willis [1981] 1 QB 450 ***(refd)***

Fernandes v. Ranganayakulu AIR 1953 Mad 236 ***(refd)***

Gopinath Deb v. Budhia Swain [1982] 54 Cut LT 515 ***(refd)***

Harbhajan Singh v. Karam Singh AIR (53) 1966 SC 641 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Kataria v. Essex Strategic Health Authority [2004] 3 All ER 572

Mui Bank Bhd v. Cheam Kim Yu [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 SC ***(refd)***

Penang Port Commission v. Kanawagi Seperumaniam [2003] 1 CLJ 819 FC ***(refd)***

Perdana Merchant Bankers Bhd v. Marial-Rionebel (M) Sdn Bhd [2005] 5 CLJ 392 HC ***(refd)***

Ramanathan Chelliah v. PP [2009] 6 CLJ 55 CA ***(dist)***

Re Uddin (a child) [2005] 3 All ER 550 ***(dist)***

Roshanlal Poddar v. State [1975] 79 Cal WN 816 ***(refd)***
Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors [1997] 2 CLJ 58 SC ***(refd)***
Taylor v. Lawrence [2002] EWCA Civ 90 ***(dist)***
Trilok Singh v. State Transport Authority, Bihar AIR 1985 Patna 87 ***(refd)***
Venkata Narasimha Appa Row v. The Court of Wards & Ors [1886] 11 AC 660 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181
Courts of Judicature Act 1964, ss. 43, 44, 50(1)(b), 67(1)
Federal Constitution, art. 121(1B)
Penal Code, s. 354
Rules of the Court of Appeal 1994, r. 4
Rules of the Federal Court 1995, r. 137
Rules of the High Court 1980, O. 53, O. 92 r. 4

For the appellant - George Lo; M/s George Lo & Partners
For the respondent - AL Bong; M/s Suhaili & Bong
Alvin Chong Chee Vun (Alicia Vun with him); M/s Alvin Chong & Partners

[Appeal from High Court, Kuching; Companies (Winding Up) No: 28-03-04-III/I]

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing JCA:

Introduction

[1] The first respondent's notice of motion ("encl 36a") prays for an order to review and set aside the winding up order made by another coram of this court ("the first coram") against the second respondent. The first respondent did not file an application in the Federal Court for leave to appeal against the said winding up order. Earlier on, the first coram had dismissed the first respondent's application in encl. 20a for leave to adduce further evidence relating to Kuching High Court Suit No. 22-218-2007-II ("the Kuching High Court Suit") filed by the first respondent against the appellant and others.

[2] In encl. 36a, the first respondent also sought to include the further evidence which the first coram had disallowed when dismissing encl. 20a.

[3] Alternatively, encl. 36a prays:

(a) for a stay of the winding up order until the completion of the Kuching High Court Suit and the determination of the first respondent's Notice of Motion filed in the Federal Court *vide* No. 08(f)-67-2009(Q) ("the Federal Court Notice of Motion") and any appeal thereafter;

(b) that the appointment (made by the first coram) of Mr Ler Cheng Chye and Mr Lum Tuck Cheong as the Liquidators be stayed or set aside or that they be removed as Liquidators; and

(c) that the Official Receiver of Malaysia and/or Tan Ghee Kiat and TV Sekhar a/l TG Venkatesan, the partners of M/s Sekhar & Tan, be appointed as new liquidators.

Preliminary Objection

[4] At the hearing of encl. 36a, appellant's learned counsel Mr George KF Lo and the liquidators' learned counsel Mr Alvin Chong Chee Vun (assisted by Ms Alicia Vun) jointly raised a preliminary objection on the ground that encl. 36a is incompetent and ought to be dismissed *in limine* as it is an attempt by the first respondent to reopen and review an appeal that had been disposed of by the first coram. They stressed that the first coram is *functus officio* and this coram has no jurisdiction to grant the orders sought in encl. 36a.

[5] Learned counsel Mr Bong Ah Loi contended for the first respondent that this coram has the jurisdiction to review the decision of the first coram and relied on *Ramanathan Chelliah v. PP* [2009] 6 CLJ 55 CA; and *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 FC.

[6] The question which this coram must address in encl. 36a is:

> Does this coram have the inherent power or jurisdiction to review and set aside the orders made by first coram of this Court?

[7] In our judgment, a good starting point is to examine the specific jurisdiction which our laws have conferred on this court. The establishment of this court in 1994 has been enshrined in art. 121(1B) of the Federal Constitution. This article reads:

121. Judicial power of the Federation

...

(1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:

(a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and

(b) such other jurisdiction as may be conferred by or under federal law.

[Am. Act A1269]

[8] Under art. 121(1B), the jurisdiction of this court is to hear and determine appeals from decisions of a High Court or a judge thereof. This court also has such other jurisdiction as may be conferred by or under federal law.

[9] As encl. 36a concerns a civil cause or matter, we have to look at the federal law which confers on this court the jurisdiction in civil cause or matter. Such jurisdiction is to be found in s. 67(1) of the Courts of Judicature Act 1964 which reads:

Appellate Jurisdiction - Civil Appeals

67. Jurisdiction to hear and determine civil appeals

(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

(For brevity and convenience, a reference hereinafter to a section is a reference to that section in the Courts of Judicature Act 1964).

[10] Under s. 67(1), the jurisdiction of this court is to hear and determine appeals from the judgment or order of any High Court in any civil cause or matter, in exercise of its original or appellate jurisdiction.

[11] Significantly, this court being a creature of statute only enjoys jurisdiction by virtue of statutory provisions: see eg, *Regina v. Collins* [1970] CA. We note that the substantive provisions enacted in art. 121(1B) and s. 67(1), either expressly or by necessary implication, do not confer any "review jurisdiction" on this court.

[12] By way of comparison, the Federal Court considered the scope of "review jurisdiction" in *Dato' Seri Anwar Ibrahim v. PP* [2004] 4 CLJ 157. The issue was whether r. 137 of the Rules of the Federal Court 1995 (r. 137) confers "review jurisdiction" on the Federal Court. Rule 137 reads:

> Rule 137. Inherent powers of the Court
>
> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any orders as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[13] The Federal Court gave the answer in the affirmative and held that the Federal Court is conferred with limited jurisdiction to review its own decisions. A similar sentiment was expressed in *Asean Security Paper Mills Sdn Bhd*, *supra*. On the other hand, there are other judgments of the Federal Court which give answers in the negative, but all these are of no consequence to us in our consideration of encl. 36a, because r. 137 which empowers the Federal Court "to hear any application" is inapplicable to this court. Rule 137 is not part of the Rules of the Court of Appeal 1994. Instead, the governing rule is to be found in O. 92 r. 4 of the Rules of the High Court 1980 ("O. 92 r. 4") which by virtue of r. 4 of the Rules of the Court of Appeal 1994 applies to this court.

[14] In this court, the question of "review jurisdiction" emerged for the first time in *Ramanathan Chelliah*, *supra*. It arose from an application in a criminal cause. There, the accused was convicted by the Sessions Court on two outraging modesty charges under s. 354 of the Penal Code. The accused appealed to the High Court. The High Court held for the accused and quashed the conviction. The public prosecutor being dissatisfied with the acquittal appealed to this court. A differently constituted bench allowed the appeal and reinstated the conviction, against which the accused successfully applied to set aside the order before another coram of this court. The relevant issue was whether one

coram of this court has jurisdiction to review an earlier decision in an appeal heard and disposed of by a different coram of this court. In relation to "review jurisdiction", Gopal Sri Ram JCA (later FCJ) followed *Taylor v. Lawrence* [2002] EWCA Civ 90, and at pp. 218 and 219 said:

> It is now settled that the Court of Appeal has jurisdiction to review its own decision in a given case. See, *Taylor v. Lawrence* [2002] EWCA Civ 90, where it was held as follows:
>
> > The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised.
>
> See also *Chu Tak Fai v. Public Prosecutor* [2007] 1 MLJ 201; [2006] 4 CLJ 931.
>
> We are of the view that it is important to recognize that this court has a residual jurisdiction to reopen an appeal which it had already determined particularly in cases where there is no further recourse to a party. In a case as the present, since the accused was tried in a subordinate court, this court is the court of last resort. The jurisdiction to reopen and review is therefore important in a case as the present to ensure that a manifest injustice does not go by uncorrected.

[15] The reasoning in the judgment in *Taylor v. Lawrence, supra*, is now reflected in the (English) CPR 52.17 which is headed 'Reopening of final appeals'. Rule 52.17(1) provides:

> The Court of Appeal or the High Court will not reopen a final determination of any appeal unless - (a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy.

[16] *Taylor v. Lawrence*, *supra*, was referred to in *Re Uddin (a child)* [2005] 3 All ER 550 CA, which was a renewed application for further consideration of the earlier refusal of the (English) Court of Appeal to grant permission to appeal. The Court of Appeal speaking through Dame Elizabeth Butler-Sloss P refused the renewed application.

[17] *Taylor v. Lawrence*, *supra*; and *Re Uddin*, *supra*, were discussed in *Abdullah Idris*, *supra*, where one coram of this court has finally heard an appeal from the Sessions Court. The convicted person made an application before yet another coram, seeking to set aside the order of an earlier coram. In essence, James Foong JCA (now FCJ), delivering the judgment for the second coram held, *inter alia*, as follows:

(a) Rule 137 is similar to O. 92 r. 4 which applies *mutatis mutandis* to this court by virtue of r. 4 of the Rules of the Court of Appeal 1994. Rule 137 does not confer jurisdiction on the Federal Court to review its own decision.

(b) Notwithstanding that r. 137 does not confer any jurisdiction on the Federal Court, the court in very limited and exceptional cases nevertheless has the inherent jurisdiction to review its own decision. Likewise, this court is seised with jurisdiction, not from O. 92 r. 4, but from a residual, implicit or implied form which makes no distinction between civil and criminal cases and within limited circumstances.

[18] We note that both *Abdullah Idris*, *supra*, and *Ramanathan Chelliah*, *supra*, invoked "the inherent, residual, implicit or implied jurisdiction" by following the common law rule enunciated in *Taylor v. Lawrence*, *supra*; and *Re Uddin*, *supra*.

[19] It is our respectful view that the judgments of the (English) Court of Appeal in *Taylor v. Lawrence*, *supra*, and *Re Uddin*, *supra*, were not concerned with the construction or interpretation of the relevant statutory provisions enacted in our art. 121(1B), s. 67(1) and O. 92 r. 4. Within our shores, the jurisdiction of this court is to be determined by reference to our own statutory provisions *viz* art. 121(1B), s. 67(1) and O. 92 r. 4. We do not have CPR 52.17. As different statutory provisions are called into question, the aforesaid two English cases are readily distinguishable. Likewise, *Abdullah Idris*, *supra*, and *Ramanathan Chelliah*, *supra*, which followed the two English judgments are also clearly distinguishable.

[20] It is plain to us that *Abdullah Idris*, *supra* and *Ramananthan*, *supra*, show another distinguishable feature. They were dealing with an order handed down by this court under s. 50(1)(b) in exercise of the jurisdiction to hear and determine an appeal against a decision made by the High Court in the exercise of its appellate jurisdiction in respect of a criminal matter decided by the Sessions Court. In those two cases, the respective coram of this court was sitting as the apex court. On the other hand, in encl. 36a, the first coram was officiating as an intermediate appeal Court, dealing with an appeal from the first instance court ie, the High Court there, in which case there was a further recourse. There was further statutory right to apply for leave to appeal to the Federal Court. Instead of exercising that right in the Federal Court, the first respondent had chosen to make a second attempt in the Court of Appeal by filing encl. 36a.

Rule 137 And O. 92 r. 4

[21] While r. 137 and O. 92 r. 4 are somewhat similar, they are not identical. In Latin it is *nullum simile est idem*. Order 92 r. 4 reads:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[22] The obvious difference between r. 137 and O. 92 r. 4 is that the words "to hear any application or" which appear in r. 137 are not to be found in O. 92 r. 4. In our view, these words in r. 137 are of critical importance. They empower the Federal Court to exercise the jurisdiction to hear any application, which had subsequently led to the enunciation of the "review jurisdiction" of the Federal Court ie, to review the earlier decision of another panel of the Federal Court with a view to setting it aside.

[23] In O. 92 r. 4, the exclusion of the words "to hear any application or" is not without significance. Such exclusion means that O. 92 r. 4 is not intended to empower this court to hear the type of application which the Federal Court has jurisdiction to hear under r. 137 and to invoke the "review jurisdiction". Order 92 r. 4 does not provide for the hearing of such an application to set aside an earlier order of this court. The "inherent powers" of this court to make any order as may be necessary to prevent injustice etc is only to be exercised by this court, if at all, in

matters pertaining to practice and procedure and only in the same proceedings. The inherent powers of this court cannot be stretched to include the hearing of a subsequent application in order to invoke the "review jurisdiction" and to set aside an earlier decision of this court, as the word "review" has never been part of O. 92 r. 4, art. 121(1B) and s. 67(1).

Meaning Of "Review"

[24] According to the *Chamber's Twentieth Century Dictionary*, the word 'review' is reconsideration and as a verb it means to see or examine again. According to the *Webster's Seventh New Collegiate Dictionary*, the word 'review' means renewed study of material previously studied: *Roshanlal Poddar v. State* [1975] 79 Cal WN 816, 1975 CrLJ 1583. Review is a statutory remedy for reconsidering the order due to error apparent on the face of the record or due to discovery of some new and important evidence or any sufficient cause: See *KJ Aiyer's Judicial Dictionary* (13th edn). The term 'review' means a judicial re-examination of the case in certain specified and prescribed circumstances: *Gopinath Deb v. Budhia Swain* [1982] 54 Cut LT 515 (DB).

[25] Where a decision is to be reviewed, the reviewing body will normally examine the lawfulness of the decision in question, as in the expression 'judicial review' or whether that decision is safe or well-founded: *Kataria v. Essex Strategic Health Authority* [2004] 3 All ER 572 at 581, QBD per Stanley Burnton J. See also *Stroud's Judicial Dictionary of Words and Phrases* (7th edn) (vol 3: P-Z).

Review Jurisdiction Is Statute-conferred

[26] In our view, the conferment of "review jurisdiction" is not by way of inherent powers. Such review jurisdiction must be expressly provided by statute. Authorities abound in support of this proposition. Illustrations are found in:

(a) *Harbhajan Singh v. Karam Singh* AIR (53) 1966 SC 641: At p. 642 Ramaswami J held that the court's power to review must be given by statute.

(b) *Drew v. Willis* [1981] 1 QB 450: Lord Esher, MR pointed out that no court has a power of setting aside an order which has been properly made, unless it is given by statute.

(c) *Anantharaju Shetty v. Appu Hegade*, AIR 1919 Mad 244. Seshagiri Aiyar, J of the Madras High Court opined: A

> It is settled law that a case is not open to appeal unless the statute gives such a right. The power to review must also be given by statute. *Prima facie* a party who has obtained a decision is entitled to keep it unassailed, unless the Legislature had indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. There is at least good reason for saying that such power should not be exercised unless the statute gives it, ... B C

(d) *Trilok Singh v. State Transport Authority*, Bihar AIR 1985 Patna 87: At p. 88, Ashwini Kumar Sinha J said that it is well settled that the power of review is not an inherent power but is created by statute and expressly conferred by the statute. The power of review has always been held to be a creature of statute. D

(e) *Fernandes v. Ranganayakulu* AIR 1953 Mad 236: At p. 237 Ramaswami J echoed the same sentiment when he said that so far as the invocation of the inherent powers of court is concerned, it has been held repeatedly and has now become well settled law that the power to review is not an inherent power, but such a right must be conferred by statute. E

[27] An illustration of the above proposition that review jurisdiction must be expressly provided by statute is to be found in our rules of court. The word "review" in the context of "judicial review" has been expressly enacted in O. 53 of the Rules of the High Court 1980, in which case, the jurisdiction by way of judicial review is clear and unambiguous. The absence of the word "review" in art. 121(1B), s. 67(1) and O. 92 r. 4 means that no review jurisdiction has ever been conferred upon this court when it was created in 1994. F G

Finality And *Functus Officio* H

[28] It is in the interest of the state and the public that there is finality in litigation. This is consistent with the doctrine of *"functus officio"* which means "having discharged his duty". In other words, a court having performed the function under the law has spent the authority and has no further authority to exercise in the same matter. I

[29] In *Venkata Narasimha Appa Row v. The Court of Wards & Ors* [1886] 11 AC 660, in delivering his speech in the House of Lords, Lord Watson said at p. 664:

> There is a salutary maxim which ought to be observed by all Courts of last resort - *Interest reipublicae ut sit finis litium*. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

[30] Our Federal Court shares a similar sentiment in *Penang Port Commission v. Kanawagi Seperumaniam* [2003] 1 CLJ 819 FC, where the issue was whether the orders made by one coram of this court can be set aside by another coram of the same court in the context of ss. 43 and 44 of the Courts of Judicature Act 1964. The Federal Court gave the answer in the negative. This was followed by this court in *Chang Shu Hua v. Goon Fook Hong* [2008] 3 CLJ 429 CA, where another panel of the same court heard the parties and gave orders that have since been perfected. Aggrieved by the decision, the defendant/respondent filed a notice of motion to another panel of this court, asking that the orders of the earlier panel of the same court be, *inter alia*, vacated. Abdul Malik Ishak JCA spoke for this court and held that another panel of co-ordinate jurisdiction has no jurisdiction to do so.

[31] Where an order which has been regularly obtained and has been drawn up and perfected, in the absence of an appeal against it, the court has no power under any application in the same action to alter, vary or set it aside, except under the slip rule, so far as necessary to correct errors in expressing the intention of the Court: *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92 FC per Chang Min Tat FJ (as he then was); which was followed by the (then) Supreme Court in *Mui Bank Bhd v. Cheam Kim Yu* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222; *Affin Bank Bhd v. WT Low & Ng Realty Sdn Bhd* [2003] 1 CLJ 674 at 684; and *Scotch Leasing Sdn Bhd v. Chee Pok Choy & Ors* [1997] 2 CLJ 58 at 66 SC.

[32] Reverting to the instant application, we view encl. 36a as nothing more than a classic attempt by the first respondent to have a second bite at the proverbial cherry and so is an abuse of the process of the court. See eg, : *Perdana Merchant Bankers Bhd v Marial-Rionebel (M) Sdn Bhd* [2005] 5 CLJ 392 at 395 HC.

Alternative Order For Stay

[33] The first respondent sought alternative orders, inter alia, that the winding up order be stayed pending disposal of the Kuching High Court Suit and Federal Court Notice of Motion.

[34] We note that the Kuching High Court Suit is a derivative action filed by the first respondent against the appellant after its oppression petition has been heard and dismissed. The trial in the Kuching High Court Suit should be allowed to proceed in furtherance of the due process of law.

[35] The Federal Court Notice of Motion was filed pursuant to an oppression petition presented by the first respondent (as the petitioner therein) against the appellant and others under s. 181 of the Companies Act 1965. That petition has been dismissed by the High Court. The first respondent's appeal to the Court of Appeal has also been dismissed. The first respondent then filed the Federal Court Notice of Motion for leave to appeal to the Federal Court. The application for leave to appeal has been dismissed by the Federal Court on 21 June 2010.

[36] In the circumstances, the alternative orders for stay sought in encl. 36a have now become otiose. There is absolutely no merit in praying for such alternative orders.

Conclusion

[37] On the foregoing grounds, we sustain the preliminary objection. Our answer to the above question is in the negative. Enclosure 36a is dismissed *in limine*.

[38] On the issue of costs, we fixed it at RM20,000 after hearing submissions thereon.